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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1972

No. 72-511

STATE OF CALIFORNIA, *Petitioner*

vs.

EDGAR A. HILLS, JR., *Respondent*

## PETITION FOR A WRIT OF CERTIORARI
to the California Superior Court for the City and County of San Francisco, Appellate Division

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## Subject Index


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Question presented | 2 |
| Statement of the case | 3 |
| A. Proceedings in state courts | 3 |
| B. Statement of the facts | 4 |
| Reasons for granting the writ | 7 |
| Argument | 8 |
| I | |
| If a police officer has probable cause to arrest a motorist for driving while intoxicated, and if there is a clear indication that a blood sample, if taken, will reveal the presence of an intoxicating level of alcohol in the bloodstream, that sample may be "seized" without a warrant due to the danger that the alcohol will be dissipated before a warrant can be secured; it is immaterial for Fourth Amendment purposes that the motorist is not under formal arrest when the blood is extracted | 8 |
| Conclusion | 23 |

## Table of Authorities Cited


| Cases | Pages |
|---|---|
| Bradford v. United States, 413 F.2d 467 (5th Cir. 1969) | 21 |
| Bradshaw v. State, 192 So.2d 387 (Miss. 1966), cert. den. 389 U.S. 941 (1967) | 15, 22, 23 |
| Commonwealth v. Appleby, 265 NE2d 485 (Mass. 1970) | 21 |
| Commonwealth v. Murray, 271 A2d 500 (Pa. 1970) | 22 |
| Compton v. People, 444 P.2d 263 (Colo. 1967) | 21 |
| Cotton v. United States, 371 F.2d 385 (9th Cir. 1967) | 21 |
| Graef v. State, 228 A2d 480 (Md.App. 1967) | 22 |
| Hadley v. State, 238 NE2d 888 (Ind. 1968) | 21 |
| Hearn v. State, 411 SW2d 543 (Tex.App. 1967) | 22 |
| Henderson v. United States, 390 F.2d 805 (9th Cir. 1967) | 22 |
| Lathers v. United States, 396 F.2d 524 (5th Cir. 1968) | 22 |
| McDonald v. Justice Court, 249 Cal.App.2d 960, 58 Cal. Rptr. 29 (1967) | 20 |
| Morales v. United States, 406 F.2d 1298 (9th Cir. 1969) | 22 |
| Parish v. Peyton, 408 F.2d 60 (4th Cir. 1969) | 21 |
| Parson v. State, 275 A2d 777 (Del. 1971) | 21 |
| People v. Bercowitz, 304 NYS2d 963 (NY City Crim. Ct. 1969) | 22 |
| People v. Bustos, 247 Cal.App.2d 422, 55 Cal.Rptr. 603 (1966) | 20 |
| People v. Cockrell, 63 Cal.2d 659, 47 Cal.Rptr. 788 (1965) | 10 |
| People v. Duroncelay, 48 Cal.2d 766, 312 P.2d 690 (1957) | 19 |
| People v. Fidler, 485 P.2d 725 (Colo. 1971) | 22 |
| People v. Glass, 266 Cal.App.2d 222, 71 Cal.Rptr. 858 (1968) | 20 |
| People v. Huber, 232 Cal.App.2d 663, 43 Cal.Rptr. 65 (1965) | 20 |
| People v. Knox, 178 Cal.App.2d 502, 3 Cal.Rptr. 70 (1960) | 20 |
| People v. Kokesh, 486 P.2d 429 (Colo. 1971) | 22 |
| People v. Kraft, 3 Cal.App.3d 890 (1970) | 21 |
| People v. Lane, 240 Cal.App.2d 634, 49 Cal.Rptr. 712 (1966) | 20 |
| People v. Pack, 199 Cal.App.2d 857, 19 Cal.Rptr. 186 (1962) | 20 |

Pages

People v. Smith, 486 P.2d 8 (Colo. 1971) ..... 21
People v. Superior Court (Hawkins) 6 Cal.3d 757, 100 Cal. Rptr. 281 (1972) .....7, 9, 10, 13, 16, 17
Preston v. United States, 376 U.S. 364 (1964) ..... 12

Remers v. Superior Court, 2 Cal. 3d 659, 87 Cal.Rptr. 202 (1970) ..... 15
Rivas v. United States, 368 F.2d 703 (9th Cir. 1966) ..... 21

Schmerber v. California, 384 U.S. 757 (1966) .....passim
Shores v. State, 233 So.2d 434 (Fla.App. 1970) ..... 22
Simms v. State, 242 A2d. 185 (Md.App. 1968) ..... 23
State Department of Highways v. Styrbicki, 169 NW2d. 225 (Minn. 1969) ..... 22
State v. Bradley, 270 NE2d. 654 (Ohio 1971) ..... 22
State v. Bryant, 167 SE2d 841 (N.C.App. 1969) ..... 19
State v. Capelle, 172 NW2d. 556 (Minn. 1969) ..... 22
State v. Cary, 230 A2d. 384 (N.J. 1967) ..... 22
State v. Davis, 226 A2d. 873 (N.H. 1967) ..... 22
State v. Deshner, 489 P.2d 1290 (Mont. 1971) ..... 22
State v. Fields, 434 SW2d. 507 (Mo. 1968) ..... 23
State v. Findlay, 145 NW2d 650 (Ia. 1966) ..... 21
State v. McMaster, 288 A2d 583 (N.J.App. 1972) .....21, 22
State v. Mitchell, 245 So.2d 618 (Fla. 1971) ..... 22
State v. Petkus, 269 A2d. 123 (N.M. 1970) ..... 22
State v. Ramos, 463 P.2d 91 (Ariz.App. 1969) ..... 21
State v. Tarantola, 461 SW2d 848 (Mo. 1971) ..... 21
State v. Turner, 494 P.2d 146 (Ida. 1972) ..... 22
Stratikos v. Department of Motor Vehicles, 477 P.2d 237 (Ore.App. 1970) ..... 21

United States v. D'Amico, 408 F.2d 331 (2nd Cir. 1969) .. 21
United States v. Harris, 453 F.2d 1317 (8th Cir. 1972) ... 21
United States v. Robinson, 447 F.2d 1215 (D.C. Cir. 1971) 21
United States v. United States District Court, 444 F.2d 651 (6th Cir. 1971) ..... 21
United States v. White, 400 U.S. 745 (1971) ..... 21
United States v. White, 405 F.2d 838, 844 n. 6 (7th Cir. 1969) ..... 21
Warden v. Hayden, 387 U.S. 294 (1967) ..... 12
Washburn v. Commonwealth, 433 SW2d. 859 (Ky. 1968) .. 22

## Codes


| | Pages |
|---|---|
| California Penal Code: | |
| Section 836 | 10 |
| Section 1538.5 | 3 |
| California Vehicle Code: | |
| Section 23102(a) | 3 |
| Section 23103 | 11 |
| Missisippi Code Annotated § 2420 (1956) | 15 |


## Constitutions


United States Constitution, Fourth Amendment .....9, 12, 13, 18


## Rules


| | |
|---|---|
| California Rules of Court: | |
| Rule 62(a) | 2 |
| Rule 63 | 2 |


## Statutes


28 United States Code, section 1257(3) ..... 2


## Texts


33 Brooklyn L.Rev., Casenote, pp. 129, 130 (1966) ..... 22

35 Fordham L.Rev., Casenote, pp. 131, 135 (1966) ..... 21

27 La.L.Rev., pp. 329, 335, 339 (1967) ..... 22

46 Neb.L.Rev., pp. 161, 172 (1967) ..... 22

44 Texas L.Rev., pp. 1616, 1619-1620 (1966) ..... 22

41 Tulane L.Rev., pp. 132, 138-139 (1966) ..... 23

20 Vand.L.Rev., pp. 655, 659 (1967) ..... 23

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## PETITION FOR A WRIT OF CERTIORARI
**to the California Superior Court for the City and County of San Francisco, Appellate Division**

Petitioner, the State of California, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Superior Court, City and County of San Francisco-Appellate Division, entered in this proceeding on June 21, 1972.

### OPINIONS BELOW

The memorandum opinion of the Appellate Division, unreported, is appended hereto as "Appendix A."

## JURISDICTION

The judgment of the California Superior Court for the City and County of San Francisco—Appellate Division was filed June 21, 1972. Petition for rehearing, application for certification to the California Court of Appeal, and petition for publication were denied on June 30, 1972. California Rules of Court, Rules 62(a), 63. This petition was filed within 90 days of the latter date. The jurisdiction of this Court is invoked under Title 28, United States Code section 1257(3).

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## QUESTION PRESENTED

1. Whether a sample of blood may be "seized," under acceptable medical conditions, from the person of an unconscious motorist, where, at the time the blood is extracted:

a. there is an initial arrest of the motorist for driving while intoxicated, which arrest is based on probable cause;

b. there is a clear indication that the sample, if taken, will reveal the presence of an intoxicating level of alcohol in the bloodstream;

c. there is reason to believe further delay in taking the test will result in the destruction of potential evidence, in that the alcohol will be dissipated from the bloodstream, thus rendering the test results legally inconclusive; but where:

d. there has been a discontinuation of normal arrest procedures and the unconscious motorist

has been hospitalized because competent medical opinion recommends that course of action.

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## STATEMENT OF THE CASE

### A. Proceedings in the State Courts

The San Francisco District Attorney filed a complaint on November 18, 1971, charging defendant, Edgar Anthony Hills, Jr., with misdemeanor drunk driving, in contravention of California Vehicle Code section 23102(a).

Defendant pleaded not guilty to the charge on December 23, 1971, in San Francisco Municipal Court. Pursuant to his demand, a jury trial was calendared for January 6, 1972.

Defendant moved, pursuant to California Penal Code section 1538.5, to suppress evidence of the blood sample. Argument on the motion was heard in the municipal court on February 22, 1972. At the conclusion of the hearing, the suppression motion was denied.

Defendant appealed the denial to the Appellate Division of the San Francisco Superior Court. On June 21, 1972, that court's memorandum opinion was filed, reversing the decision of the municipal court and ordering evidence of the blood sample suppressed. The district attorney's petitions for rehearing, for publication (to enable the California Court of Appeal to certify up the case on its own motion), and for certification on motion of the Appellate Division, were all denied on June 30, 1972.

**B. Statement of the Facts**

The following statement of facts is taken from the reporter's transcript of testimony heard in San Francisco Municipal Court on February 22, 1972, during the hearing on defendant's motion to suppress evidence of the blood sample. References to that transcript are denoted RT, followed by the page number.

California Highway Patrol Officer James Leonard and his partner (RT 8) were driving south on Interstate Highway 280 in the early-morning hours of Friday, November 12, 1971 (RT 9). Approximately one quarter mile north of the Ocean Avenue off-ramp (RT 9), his attention was drawn to defendant Hills' automobile approximately ten car lengths ahead on the highway (RT 9). The police vehicle was gaining slightly on the other automobile, the speed of which was estimated at 40 miles per hour (RT 9).

Hills was driving erratically. Officer Leonard described the weaving course of the vehicle as follows:

> "It's a continual adjustment—readjustment, overreaction-underreaction, of normal driving habits in which the vehicle just continually never seemed to go directly down the lane of traffic . . . I counted the amount of times in just approximately one-quarter-of-a-mile distance the subject's vehicle straddled the white line to his left a good two feet into the southern, the S-3 lane. He did this four times. He also went on the shoulder area approximatly two feet on one occasion" (RT 10:2-4, 9-13).

The officers activated their vehicle's overhead red light in an attempt to get Hills to pull off the high-

way on to the shoulder (RT 10). They saw Hills look at them in his rearview mirror (RT 10). However, he registered no visible reaction, and instead drove to the Ocean Avenue off-ramp and one-eighth mile down Ocean Avenue before stopping (RT 10, 11). He could have stopped on the shoulder area at any point along the route (RT 11). Hills, however, contended in court that there was no shoulder along that part of the highway (RT 20).

Hills immediately exited his vehicle. The officer requested that he step to the curb, which he unsteadily did (RT 11). Again, Officer Leonard's description of Hills' condition is particularly vivid:

> "He wasn't walking a straight line. He was correcting — undercorrecting — overcorrecting — take a long step, a short step, a side step. As we got close together, I could then observe, or smell, a strong alcoholic—an odor of an alcoholic beverage—on the subject" (RT 11:17-21).

Officer Leonard advised Hills why he had been pulled over and asked to see his driver's license (RT 11). Hills fumbled through his wallet, finally found the license, then required several minutes to remove the license from the wallet (RT 12). What few words Hills spoke were "very slurred—like a mouthful of mush or something" (RT 12:7-9). He did, however, admit to having "two or three" drinks (RT 18).

The officer next asked if Hills would mind performing several sobriety tests, to which Hills replied he was having some trouble with his truck drivers (RT 12). As the officer pondered that reply, Hills

took two steps to the side and softly collapsed against the hood of his automobile (RT 12). He was unconscious (RT 12).

Fearing that Hills had a pre-existing physical condition, such as diabetes, which had been aggravated by his alcohol intake, Officer Leonard searched Hills' person for a Med-Alert card or similar warning (RT 12). He found nothing. Accordingly, Officer Leonard handcuffed Hills and placed him in the rear of the patrol car, thereafter driving to Central Emergency Hospital (RT 13). Hills was handcuffed even though unconscious because police policy requires that all arrested persons be handcuffed when transported in a patrol vehicle (RT 13). After further efforts to revive Hills proved unsuccessful (RT 13), he was placed on a gurney and transported inside by orderlies.

A Doctor Hadel (RT 13) agreed that Hills' condition was more pronounced than that of the usual person under the influence of alcohol (RT 14). He therefore advised that the unconscious man should be taken by the officers to Mission Emergency Hospital with its more extensive testing facilities (RT 14).

At Mission Emergency Hospital, a Doctor Bails (RT 15) immediately withdrew a small amount of blood for use in a blood sugar test (RT 15). Hills was apparently roused to semi-consciousness (RT 15, 16, 18) but never became so conscious as to answer the officer's questions intelligently (RT 15). Approximately one-half hour after the first extraction of blood, Officer Leonard requested that a second sample be taken. Doctor Bails withdrew the blood (RT 15).

The doctor was of a similar opinion concerning the possible seriousness of Hills' condition (RT 16); he therefore requested that the officers leave Hills in the hospital (RT 15). The officers complied with the request, with the result that X-rays were later taken (RT 21) and Hills left the hospital the following morning (RT 17, 21).

Officer Leonard's report of the incident was forwarded to the district attorney's office. That office recommended that a ticket be written, and filed a complaint against Hills (RT 17). Hills subsequently received the complaint by mail (RT 22).

The municipal court regarded the pivotal question as being whether Hills had been arrested. Its finding was that an arrest had occurred and had continued to exist (RT 23). The Appellate Division shifted the inquiry to whether an arrest was still in effect when the sample was taken, finding that no arrest was then in effect, but only a "detention." Appendix A.

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**REASONS FOR GRANTING THE WRIT**

The Appellate Division's holding, based solely on the opinion of the California Supreme Court in *People v. Superior Court (Hawkins)*, 6 Cal.3d 757, 100 Cal.Rptr. 281 (1972), misperceives the thrust of this Court's decision in *Schmerber v. California*, 384 U.S. 757 (1966). In holding that the continued existence of formal arrest status is an absolute prerequisite to the taking of any blood sample, the Appellate Division ignored the stress of this Court in *Schmerber*

on the requirement of a "clear indication" that the blood test will reveal the presence of alcohol, focusing instead on the fortuitous factor (in *Schmerber)* of the existence of an arrest. By making arrest the prerequisite to the taking of a blood sample, the Appellate Division applied a rule which affords less protection to motorists who exhibit no clear indication of intoxication, but which completely shields motorists who exhibit such a clear indication in situations where formal arrest procedures are discontinued for emergency health reasons. Only a clarification by this Court of the essence of its holding in *Schmerber* can provide reasonable standards to govern the extraction of blood in such circumstances.

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## ARGUMENT

### I

**IF A POLICE OFFICER HAS PROBABLE CAUSE TO ARREST A MOTORIST FOR DRIVING WHILE INTOXICATED, AND IF THERE IS A CLEAR INDICATION THAT A BLOOD SAMPLE, IF TAKEN, WILL REVEAL THE PRESENCE OF AN INTOXICATING LEVEL OF ALCOHOL IN THE BLOODSTREAM, THAT SAMPLE MAY BE "SEIZED" WITHOUT A WARRANT DUE TO THE DANGER THAT THE ALCOHOL WILL BE DISSIPATED BEFORE A WARRANT CAN BE SECURED; IT IS IMMATERIAL FOR FOURTH AMENDMENT PURPOSES THAT THE MOTORIST IS NOT UNDER FORMAL ARREST WHEN THE BLOOD IS EXTRACTED.**

This Court authoritatively stated in 1966 that the "seizure" of a blood sample from an unconsenting motorist in a medically acceptable manner under certain strictly defined circumstances is not violative

of the Fourth Amendment. *Schmerber v. California*, 384 U.S. 757, 766-771 (1966). That holding was reached only after a subtle balancing of conflicting interests; interests in the sanctity of the human person, interests of the society seeking to combat the depressing slaughter on its highways, and interests in the reasoned application of the Fourth Amendment. It has taken only six short years to demonstrate that the balancing of interests involved in *Schmerber* was perhaps *too* subtle. Decisions such as that of the Appellate Division in the instant cause, resulting from the California Supreme Court's holding in *People v. Superior Court (Hawkins)*, 6 Cal.3d 757, 100 Cal.Rptr. 281 (1972),[1] are the clearest indication that

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[1]The Appellate Division offered no rationale for its decision, and rather clearly felt itself bound by the *Hawkins* decision. Since it is that case which undertakes to explain the reason for requiring a formal arrest prior to the extraction of blood, it is to that explanation that we must turn. However, application of the *Hawkins* rule to the *instant* fact situation most graphically shows the shortcomings of that rule.

It is also interesting to note the Appellate Division's rather cavalier disregard of the municipal court's finding that an arrest had in fact occurred (RT 22). Indeed, it is hard to imagine what greater modicum of restraint could have been placed on Hills at the time the blood sample was taken. At that point in time he was under total control, a fact attested to by the officer's own words (RT 13) and by his handcuffed condition initially. Only after the taking of blood, and pursuant to the doctor's request, did the officers leave Hills in the hospital.

What were the officers reasonably required to do to perpetuate the arrest at that time? Leave an officer at the hospital? Handcuff Hills to the bed? Refuse to leave him at the hospital? Such questions only suggest themselves because of the Appellate Division's appellate factual re-evaluations.

The effect of the *Hawkins* rule is to encourage less analytic lower court decisions. That is, the lower appellate court need only ask whether an arrest has or has not occurred. If so, the blood sample is allowable in evidence; if not, it is suppressed. None of the more difficult and more crucial issues faced in *Schmerber* need then be

the time has come for this Court to redefine the parameters of *Schmerber,* particularly in cases involving unconscious motorists.

Two Fourth Amendment problems were resolved in *Schmerber.* The first of these, what quantum of "cause" must be shown by the officer who orders the sample to be withdrawn, involves nothing more than application of the most basic probable cause rules to the blood sample situation. The problem is the blood sample situational equivalent of such issues as probable cause necessary to arrest or probable cause necessary to justify issuance of a search warrant. The issue in a blood sample context is unique in that it involves intrusions beyond the body's surface and concomitant interests in human dignity and privacy. *Schmerber v. California, supra,* at 769-770. Those interests were felt to demand a more stringent requirement of justification for the intrusion. In addition to the usual necessity that there be probable cause to arrest, e.g., California Penal Code section 836, *People v. Cockrell,* 63 Cal.2d 659, 47 Cal.Rptr. 788 (1965), there must exist a "clear indication" that the blood sample, if taken, would reveal the presence of alcohol.

It is clear the justification required for extraction is on two levels. The first level, probable cause to ar-

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confronted. It is this implicit encouragement of superficial analysis on the part of lower courts which is the real fault in *Hawkins.* The fault is exacerbated because, as we have asserted, the *Hawkins* decision focuses on what was a purely fortuitous factor in *Schmerber,* that of an arrest, and ignores the crucial factors in *Schmerber*—probable cause to arrest and a clear indication that the test will reveal alcohol.

rest, can be said to exist where, as here, the officer views the motorist's erratic control of his vehicle. After watching the automobile weave from the third lane to the shoulder and back again, Officer Leonard had probable cause to arrest defendant Hills for *some offense* involving unsafe control of his vehicle. Although driving while intoxicated is one such offense, it is by no means the only one. Probable cause alternatively existed to arrest Hills for reckless driving. California Vehicle Code section 23103.

Such cause, without more, cannot justify the extraction of blood. That bodily intrusion is justified only after the officer clearly witnesses or is otherwise made aware of the motorist's presently intoxicated condition. Awareness of such phenomena as a strong odor of alcohol about the person of the motorist or about the interior of the vehicle; slurred, mushy speech; non-responsive answers to questions or other verbal gibberish; open liquor bottle; unsure coordination; dazed condition manifested as unawareness of the situation; or of any pronounced combination of such factors provides a clear indication to the officer that a blood sample will reveal intoxication as an explanation of the symptoms. The officer, that is, no longer has probable cause to arrest for alternative offenses; it becomes quite clear that the offense committed is intoxicated driving. Here, it was the combination of Hills' slurred speech, admission of alcoholic consumpton, unresponsive answer concerning truck drivers, and strong personal odor of alcohol which could clearly indicate to Officer Leonard that a blood

sample, if taken, would reveal the presence of alcohol.

"Although the facts which established probable cause to arrest in this case also suggested the required relevance and likely success of a test of petitioner's blood for alcohol," *Schmerber v. California, supra,* at 770, it remains to resolve the second problem considered there—whether the officer is justified in ordering the blood to be extracted without first procuring a search warrant. Whether he is so justified must be analyzed by reference to the few, well-defined exceptions to the Fourth Amendment warrant requirement. In the instant case, as in *Schmerber* itself "where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant." *Id.* at 770-771. The accumulating passage of time (over half an hour alone passed between the taking of the first and second blood sample at the second hospital) threatened to destroy the evidential value of any blood sample. Under such circumstances, Officer Leonard acted reasonably in ordering the extraction. *Schmerber v. California, supra,* at 770; *Preston v. United States,* 376 U.S. 364 (1964); *see Warden v. Hayden,* 387 U.S. 294, 298 (1967).

Extraction of Hills' blood was utterly reasonable within the contemplation of *Schmerber.* The Appellate Division felt bound to suppress evidence of that extraction because of a factual determination that Hills had not continued to be under formal arrest when the sample was taken, an appellate re-evalua-

tion of the facts the wisdom of which has been herein questioned, *supra,* at n. 1. Appendix A. That result was inevitable, given the supervening decision of the California Supreme Court in *People v. Superior Court (Hawkins), supra.* It is to the reasoning of that latter decision that we turn. It is most instructive to consider the analysis employed by that court in attempting to resolve each of the two Fourth Amendment problems resolved in *Schmerber.*

> "It is clear that the Fourth Amendment does not bar a compulsory seizure, without a warrant, of a person's blood for the purposes of a blood alcohol test to determine intoxication, providing that the taking of the sample is done in a medically approved manner, is incident to a lawful arrest, and is based upon the reasonable belief that the person is intoxicated." *People v. Superior Court (Hawkins), supra,* at 761. (Citing *Schmerber v. California, supra,* at 766-772).

The court goes on to assert that "*Schmerber's* approval of the compulsory seizure of blood is clearly grounded on the premise that it is incidental to a lawful arrest." *Id.* (Citing *Schmerber v. California, supra,* at 768, 769, 771). However, the untortured meaning of those passages in *Schmerber* cited in support of the proposition suggests a lesser importance of the factor of an ongoing arrest. At most, *Schmerber* indicates that an arrest will often occur in stops of intoxicated motorists; the logical extension of that indication is certainly not a requirement that an arrest always occur. It is further indicated that "the mere fact of a lawful arrest does not end

our inquiry." *Id.* at 769. Given the *Schmerber* factual context, with arrest a component thereof, it is clear that the warrantless seizure could be justified on a search incident to arrest theory. *Id.* at 771. Under a slightly different fact situation, where no arrest has occurred but where the motorist is under close custody, a warrantless seizure could probably not be justified on a search incident to arrest theory. However, it does not follow that the warrantless search could not be justified by reference to one of the other well-drawn exceptions to the general warrant requirement, such as the "destruction of evidence" exception.

*Schmerber,* then, does not exalt the factor of continuing arrest status to a pivotal substance. It must be remembered that the purpose of defining that quantum of cause which the police must have in order to take a sample even pursuant to a warrant is to narrow the class of motorists from whom blood may be extracted to those *clearly* intoxicated. It is obviously only those motorists who are the dangers, the perpetrators of carnage. Just as obviously, the sanctity of the individual demands that such "searches" beneath the body surface be limited to that dangerous class of individuals. The requirement of probable cause to arrest eliminates from the class of drivers who may have to undergo such a search those motorists who are not operating their vehicle in violation of the rules of the road. The crucial requirement of "clear indication" eliminates from the remaining class of potential searched drivers those motorists who are

driving unsafely, but are doing so for reasons not associated with consumption of alcoholic beverages. The class remaining is the group of motorists whose dangerous conduct outweighs their claim to individual sanctity and who must take the blood test.

The crucial inquiry is whether requiring an arrest serves to limit the class of motorists who might be forced to take the test to a constitutionally acceptable level. We think that the requirement does not so limit. An arrest adds no modicum of protection to the general class of motorists not already provided by the *Schmerber* requirements of probable cause to arrest and clear indication of intoxication. The continuing formal arrest for driving while intoxicated is not the factor of importance, since an arrest for that offense could be predicated on no more than probable or reasonable cause to believe the driver intoxicated. Such probable cause to arrest for intoxicated driving is not as demanding a standard as is that of clear indication.[2] The focusing on existence of an arrest (which may be based on only reasonable cause to believe the driver has operated his vehicle while intoxicated), actually serves to widen the class of motorists who are subjected to the extraction. A method of

[2]Clear indication is a term more susceptible of uniform interpretation, whereas arrest is a creature of varying interpretations according to the substantive rules governing probable cause to arrest from state to state. In California, probable cause to arrest may not rise far above a requirement that the conduct viewed be slightly more consistent with guilty than with innocent behavior. *Cf. Remers v. Superior Court*, 2 Cal. 3d 659, 664, 87 Cal.Rptr. 202 (1970). In other states, the standard may be even less stringent, *e.g.*, Miss. Code Ann. § 2420 (1956); *Bradshaw v. State*, 192 So.2d 387, 388 (Miss. 1966), *cert. denied*, 389 U.S. 941 (1967).

analysis which exalts the form of an arrest over the substance of a clear indication of present intoxication is actually counter-productive to that preservation of individual sanctity sought by the Fourth Amendment.

Nor is the existence of an arrest of importance when determining the circumstances under which the officer may himself order the blood sample drawn. *Schmerber* seems to indicate that the only possible exception to the warrant requirement upon which the prosecution may rely in a blood sample situation is the imminent destruction of evidence exception. *Schmerber v. California, supra,* at 770. To rely on that exception is eminently sensible, given the constant danger that the alcohol present in the bloodstream will be oxidized over time, thus making the sample of doubtful probative value if taken too long after the motorist is first stopped.

But the presence of an arrest has been interpreted to mean that the prosecution may also proceed on a search incident to arrest theory in support of the officer's own request that blood be withdrawn. *People v. Superior Court (Hawkins), supra,* at 762-763. That interpretation fails to note *Schmerber's* recognition that the blood sample situation is a unique one, requiring the writing of rules "on a clean slate." *Schmerber v. California, supra,* at 768. More specifically, it is said that the general rationales for a warrantless search incident to arrest "have little applicability with respect to searches involving intrusions beyond the body's surface." *Id.* at 769-770.

*Schmerber's* disclaimer of the search incident to arrest exception to the warrant requirement is a proper one. Searches incident to arrest are allowed, not because a specific indication from case to case that a search will uncover weapons or contraband or tools of escape, but because of a general indication, based on past arrests, that a search will so discover. There simply is not a concrete expectation that the search will be rewarding in any particular case. To engraft such a rationale on the blood sample "search" situation rules is to dilute the strict requirement of a clear indication the particular search will uncover evidence. The "search incident to arrest" rationale is not applicable in a blood sample situation. Similarly, the fact of arrest, which has independent significance only where a search incident to arrest theory is relied upon, is not of importance. Arrest provides no assistance in determining when a police officer may himself order the extraction of blood.

It will doubtless be suggested to this Court that even if arrest does not provide an analytic tool in gauging the reasonableness of particular warrantless blood extractions, the requirement of arrest involves no significant burden on the officer. That is, the effort required to utter the formal words of arrest is *de minimis;* to require that the effort be made imposes no hardship. Put another way, there are no "exigent circumstances" present which permit the officer to order the blood drawn before arresting the subject. *People v. Superior Court (Hawkins), supra,* at 765 n. 7. Even were we willing to accept the proposition

that the Fourth Amendment standard of "reasonableness" somehow requires the cynical incantation of phrases over the unconscious or uncomprehending motorist-defendant, we think the effect of requiring arrest *is* to impose more than a perfunctory obligation on the officer.

Since *Schmerber* was a case wherein an arrest had occurred, it was not there considered whether fact situations might exist in other cases such as would obviate the necessity for an arrest. The instant case presents such a fact situation with accompanying obviating circumstances. From the moment defendant Hills slumped against the hood, Officer Leonard and the doctors involved believed that a pre-existing physical infirmity had been accentuated as to seriousness by the intoxication. Although there is no subsequent indication of either diabetes (the presence of which Officer Leonard suspected) or concussion (the presence of which the doctors implicitly suspected, witness the taking of X-rays) that does not alter the reasonableness of Officer Leonard's belief that Hills had to be immediately removed to a hospital. Just as the emergency caused by dissipation of the blood's alcohol content over time operated to forgive the requirement of a warrant, so the parallel emergency caused by defendant Hills' uncertain physical condition operated to forgive the possible requirement of a complete arrest. Indeed, the hypothetical combination of a collapse such as Hills' plus an arresting officer forced to pay more attention to legal concerns than to humanitarian ones and so arresting, plus a

possibly fatal result is not extreme. The emergency presented by the motorist's collapse, that is, even more strongly compels that the formal arrest procedure be shortened than does the emergency caused by dissipation of alcohol. *See State v. Bryant*, 167 SE2d 841, 843, 847 (N.C.App. 1969).

But what if future cases be assumed which present no danger of physical collapse, merely a surly, unconsenting motorist; if the requirement of arrest involves no valuable loss of time, may not it be said that the requirement of an arrest is a harmless one? Once again, it must be replied that the requirement of arrest may be expected to produce subtle, but no less invidious for being, so, results. What is to be feared is a straining by appellate courts in close cases to "get around" the arrest requirement. If the taking of the blood sample is otherwise reasonable within the meaning of *Schmerber* (as we have analyzed the case above), a court might resort to a legal fiction of one sort or another to be able to characterize certain custody as "arrest" rather than "detention" or a similar term. Such a prophecy is not idly speculated.

The California Supreme Court had held in 1957 that a warrantless seizure of blood could be justified on a search incident to arrest rationale. *People v. Duroncelay*, 48 Cal.2d 766, 771-772, 312 P.2d 690 (1957). Thereafter, a split of opinion emanated from the California Courts of Appeal on the issue of whether *People v. Duroncelay* absolutely required that such a seizure be incidental to a lawful arrest.

*Compare People v. Glass,* 266 Cal.App.2d 222, 229; 71 Cal.Rptr. 858 (1968) (no arrest required); *McDonald v. Justice Court,* 249 Cal.App.2d 960, 963; 58 Cal.Rptr. 29 (1967) (same); *People v. Huber,* 232 Cal.App.2d 663, 667, 671; 43 Cal.Rptr. 65 (1965) (no arrest, seizure justified on exigent circumstances ground); *People v. Pack,* 199 Cal.App.2d 857, 864; 19 Cal.Rptr. 186 (1962) (same); *People v. Knox,* 178 Cal.App.2d, 502, 508, 515; 3 Cal.Rptr. 70 (1960) (arrest nine days later might be contemporaneous with search); *with People v. Bustos,* 247 Cal.App2d 422, 426; 55 Cal.Rptr. 603 (1966) (if arrest required custody necessary to take blood assumed to constitute arrest); *People v. Lane,* 240 Cal.App.2d 634, 636-638; 49 Cal.Rptr. 712 (1966 (suspect placed under "mental arrest" by officer, held sufficient arrest).

Of interest are the cases which felt bound to require an arrest, then struggled to invent one, by such expedients as "mental arrest" (*Lane*), custody transformed (*Bustos*), and "contemporaneous" arrest (*Knox*). Resort to such interpretative fictions by lesser appellate courts is the clearest indication that the decision of the highest appellate court is impossible to apply. Somewhat less frantically than Cassandra we suggest that future lower appellate opinions of a similar nature are possible should this Court now refuse to provide guidance in the form of a subsequent explanation of *Schmerber's* parameters.

One final confusion now deserving of clarification must be mentioned. While it is primarily interpretations of *Schmerber* by state appellate courts which

have engendered confusion, some uncertainty has arisen due to the multi-factor calculus of conflicting interests employed in *Schmerber*. Courts have characterized the case as an "emergency circumstances-preservation of evidence case," *United States v. Harris*, 453 F.2d 1317, 1321 (8th Cir. 1972); *United States v. United States District Court*, 444 F.2d 651, 659 (6th Cir. 1971); *United States v. White*, 405 F.2d 838, 844 n. 6 (7th Cir. 1969) *reversed on other grounds, United States v. White*, 400 U.S. 745 (1971); *United States v. D'Amico*, 408 F.2d 331, 332-333 (2nd Cir. 1969); *Parish v. Peyton*, 408 F.2d 60, 64 n.2 (4th Cir. 1969; *Rivas v. United States*, 368 F.2d 703, 711 (9th Cir. 1966); *People v. Kraft*, 3 Cal.App.3d 890, 894 (1970); *People v. Smith*, 486 P.2d 8, 9 (Colo. 1971); *Compton v. People*, 444 P.2d 263, 265-267 (Colo. 1967); *Hadley v. State*, 238 NE2d 888, 897 (Ind. 1968); *State v. Findlay*, 145 NW2d 650, 654-656 (Ia. 1966); *Commonwealth v. Appleby*, 265 NE2d 485, 488 (Mass. 1970); *State v. Tarantola*, 461 SW2d 848, 851 (Mo. 1971); *State v. McMaster*, 288 A2d 583, 584 (N.J.App. 1972); Casenote, 35 Fordham L.Rev. 131, 135 (1966); *see Stratikos v. Department of Motor Vehicles*, 477 P.2d 237, 239 (Ore.App. 1970); or as a "search incident to arrest" case, *United States v. Robinson*, 447 F.2d 1215, 1225 (D.C. Cir. 1971) (dissenting opinion of Skelly-Wright, J.); *Bradford v. United States*, 413 F.2d 467, 471-472 (5th Cir. 1969); *Cotton v. United States*, 371 F.2d 385, 392 (9th Cir. 1967); *State v. Ramos*, 463 P.2d 91, 95 (Ariz. App. 1969); *Parson v. State*, 275 A2d 777, 789 (Del. 1971);

*Shores v. State,* 233 So.2d 434, 436-437 (Fla.App. 1970) *Graef v. State,* 228 A2d, 480, 484 (Md.App. 1967); *State v. Capelle,* 172 NW2d. 556, 559 (Minn. 1969); *State v. Davis,* 226 A2d. 873, 876-877 (N.H. 1967); *People v. Bercowitz,* 304 NYS2d. 963, 967 (NY City Crim. Ct. 1969); *State v. Bradley,* 270 NE2d. 654, 657 (Ohio 1971); *Commonwealth v. Murray,* 271 A2d. 500, 501 (Pa. 1970); *Note,* 27 La.L.Rev. 329, 335, 339 (1967); *Casenote,* 33 Brooklyn L.Rev. 129, 130 (1966); *cf. State v. Turner,* 494 P.2d 146, 149 (Ida. 1972); *State v. Petkus,* 269 A2d. 123, 124 (N.M. 1970); *but see Hearn v. State,* 411 SW2d. 543, 545 (Tex.App. 1967) (failure to complete arrest formalities not fatal to conviction); *contra*: *People v. Fidler,* 485 P.2d 725, 727 (Colo. 1971); *State v. Deshner,* 489 P.2d 1290, 1292 (Mont. 1971); *State v. McMaster, supra;* as a case involving some variable standard of reasonable cause to arrest, *Lathers v. United States,* 396 F.2d 524, 527 (5th Cir. 1968); *People v. Kokesh,* 486 P.2d 429, 430-431 (Colo. 1971); *Washburn v. Commonwealth,* 433 SW2d. 859, 860-861 (Ky. 1968); *State Department of Highways v. Styrbicki,* 169 NW2d. 225, 227 (Minn. 1969); *State v. Cary,* 230 A2d. 384, 387 (N.J. 1967); case note, 46 Neb.L.Rev. 161, 172 (1967); *contra*: *Note,* 44 Texas L.Rev. 1616, 1619-1620 (1966), or as a case involving a "clear indication" of intoxication or guilt, *Morales v. United States,* 406 F.2d 1298, 1299-1300 (9th Cir. 1969); *Henderson v. United States,* 390 F.2d 805, 807-808 (9th Cir. 1967); *State v. Mitchell,* 245 So.2d 618, 622-623 (Fla. 1971); *Bradshaw v. State, supra,* 192

So.2d. at 388; *State v. Fields,* 434 SW2d. 507, 513 (Mo. 1968); *Note,* 41 Tulane L.Rev. 132, 138-139 (1966); *Note,* 20 Vand.L.Rev. 655, 659 (1967); *see Simms v. State,* 242 A2d. 185, 192 (Md.App. 1968) (clear indication same as probable cause to arrest).

It would seem that this secondary uncertainty provides final reason for this Court to write upon that slate, once so clean, now grown so clouded.

---

**CONCLUSION**

We respectfully request the Court to grant a writ of certiorari and reverse the decision of the San Francisco Superior Court—Appellate Division.

Dated, September 26, 1972.

EVELLE J. YOUNGER,
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DORIS H. MAIER,
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**(Appendix "A" Follows)**

## Appendix "A"

In the Superior Court of the State of California
in and for the City and County of San Francisco
Appellate Department

Appeal No. 1828

The People of the State of California,
Plaintiff and Respondent,
vs.
Edgar Anthony Hills, Jr.,
Defendant and Appellant.

### MEMORANDUM OPINION

This is an appeal from the trial court's denial of a defendant-appellant's motion to suppress evidence of the results of a blood alcohol test.

The correctness of the lower court's ruling is dependent upon the issue of whether or not the "search" was incident to a lawful arrest (*People v. Superior Court,* 6 Cal.(3d) 757).

In summary, the evidence established: that the officers stopped defendant's vehicle for erratic driving; that defendant got out of the car and after a brief incoherent conversation collapsed in a state of unconsciouness; that defendant had an alcoholic breath and

that his speech was slurred; that while in his unconscious state defendant was handcuffed and taken to the Central Emergency Hospital; the officer described defendant as being under arrest while being so transported; after defendant was examined by a doctor at the Central Emergency the doctor recommended defendant be taken to a bigger or better hospital for further tests because he thought defendant was "further out than he should have been for a person under the influence"; defendant was then transported to Mission Emergency Hospital (the officer was not certain whether by patrol car or ambulance—the record is silent as to whether defendant was still handcuffed at this point or any later point); at the Mission Emergency a doctor drew a blood sample to run a blood-sugar test, and "ran a normal physical, usual things doctors do"; at the request of the officer the doctor tried to "get him awake" but at no time did defendant ever become awake enough to be able to give a complete or intelligent "yes" or "no" to any question; the officer then requested the doctor draw blood for a blood alcohol test; this was done; thereupon the doctor said he wanted to keep defendant for further observation and the officers "just let him admit him to the hospital and we left."; no citation was issued and nothing further of a legal nature was done until a complaint was filed some days later. The officers did not place any restraint upon defendant in the hospital and did not leave any instructions that defendant was not to leave the hospital; he was free to go; the officer released him to the hospital.

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In reviewing the law as to arrest, we find: that an arrest is the taking of a person into custody in a case and manner authorized by law (P.C. 834); that a temporary detention is not an arrest (Witkin, *California Criminal Procedure,* 1969 Supp., p. 29, par. 95); that if an arrest was made the defendant could only be released under the following conditions: (1) if cited and he promised to appear; (2) if an officer decides there are insufficient grounds for arrest; or (3) defendant was arrested for intoxication only and no further proceedings were desirable. Absent any of these conditions, the person arrested must be taken before a magistrate without unnecessary delay. (P.C. 849)

It is obvious that the defendant was not taken before a magistrate and also that the "arresting" officer had no plans to do so when he left the hospital. It is likewise apparent that if the defendant was ever under arrest that evening, there was a time during the evening that he was no longer under arrest; whether that time was before, at or after the time of the taking of the blood test cannot be determined from the evidence. A blood test taken incident to a detention, as distinguished from an arrest, has been held to be an illegal search. (*People v. Superior Court,* 6 Cal.3d 757.)

In view of the foregoing, we believe that the People have failed to sustain their burden to prove that the taking of the blood sample was incident to a lawful arrest *(People v. Superior Court, supra).*

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Therefore, in our opinion the Motion to Suppress should have been granted. The order appealed from is reversed.

Dated: June 19, 1972.

Raymond J. Arata
Judge of Said Court

Concur:

H. A. van der Zee
Presiding Judge of Said Court

Charles S. Peery
Judge of Said Court

Filed June 21, 1972,
Martin Mongan, Clerk.

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Supreme Court, U. S.
FILED
DEC 26 1972
[illegible]

IN THE

SUPREME COURT OF THE UNITED [illegible]

October Term, 1972

No. 72-511

STATE OF CALIFORNIA,

Petitioner,

vs.

EDGAR A. HILLS, JR.,

Respondent.

---

RESPONSE TO A PETITION
FOR A WRIT OF CERTIORARI
To the California Superior Court
for the City and County of San Francisco,
Appellate Division

---

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IN THE

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## TOPICAL INDEX


| | Page |
|---|---|
| Table of Authorities | iii |
| STATEMENT OF THE CASE | 2 |
| A. Proceedings In The State Courts | 2 |
| B. Statement Of The Facts | 2 |
| IT IS RESPECTFULLY SUBMITTED THAT THE UNITED STATES SUPREME COURT DOES NOT HAVE JURISDICTION TO ENTERTAIN OR GRANT PETITIONER'S PETITION FOR A WRIT OF CERTIORARI | 6 |
| THE DECISION OF THE COURT BELOW IS CORRECT, IS BASED SOLELY UPON INDEPENDENT STATE GROUNDS, AND DOES NOT INVOLVE A FEDERAL QUESTION, THEREBY PRECLUDING A GRANT OF CERTIORARI | 8 |
| REASONS WHY THE WRIT SHOULD NOT BE GRANTED | 9 |
| ARGUMENT | 11 |
| IT IS THE SETTLED LAW OF BOTH CALIFORNIA AND THE UNITED STATES THAT A PEACE OFFICER, HAVING PROBABLE CAUSE TO ARREST A MOTORIST FOR DRIVING WHILE INTOXICATED, MUST NONETHELESS PERFECT A VALID AND LAWFUL ARREST OF THE MOTORIST INVOLVED, BEFORE SUCH PEACE OFFICER'S AUTHORITY COMES INTO FRUITION TO CONDUCT A WARRANTLESS SEARCH | |

Page

BY WAY OF EXTRACTION OF THE MOTORIST'S BLOOD FOR ALCOHOL ANALYSIS, "EMERGENCY" CONDITIONS ATTENDING TO THE SITUATION NOTWITHSTANDING 11

CONCLUSION 26



COPY BOUND TO

## TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| Agnello v. United States, 269 U.S. 20 | 17 |
| Coolidge v. New Hampshire (1971) 403 U.S. 443 | 19 |
| Department of Mental Hygiene of California v. Kirchner (1965) 380 U.S. 194 | 8 |
| Dixon v. Duffy (1951) 342 U.S. 33 | 7 |
| Edelman v. People of the State of California (1953) 344 U.S. 357 | 7 |
| Jones v. United States, 357 U.S. 493 | 19 |
| Katz v. United States (1967) 389 U.S. 347 | 17 |
| McDonald v. United States, 335 U.S. 451 | 19 |
| People v. Hatcher (1969) 2 Cal.App.3d 71 | 12 |
| People v. Manis (1969) 268 Cal.App.2d 653 | 12 |
| People v. Superior Court, Hawkins Real Party in Interest (1972) 6 Cal.3d 757 | 8, 9, 15, 16 |




TOO CLOSE IN CENTER

| Cases | Page |
|---|---|
| Schmerber v. California (1966) 384 U.S. 757 | 15, 16, 18 |
| United States v. Jeffers, 342 U.S. 48 | 17, 19 |
| Wong Sun v. United States, 371 U.S. 471 | 17 |
| **Constitution** | |
| United States Constitution: | |
| Fourth Amendment | 17 |
| **Codes** | |
| California Penal Code: | |
| §834 | 11 |
| §836.5 | 12 |
| §841 | 13 |
| §849 | 13 |
| 28 U.S.C. §1257 (3) | 6 |
| California Vehicle Code: | |
| §40500 | 14, 23 |




COPY BOUND TO

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-511

STATE OF CALIFORNIA,

Petitioner,

vs.

EDGAR A. HILLS, JR.,

Respondent.

---

RESPONSE TO A PETITION
FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA SUPERIOR COURT
FOR THE CITY AND COUNTY OF SAN FRANCISCO,
APPELLATE DIVISION

---

Respondent, EDGAR A. HILLS, JR., respectfully presents this, his Response to the Petition For Writ of Certiorari by Petitioner, the STATE OF CALIFORNIA, and respectfully prays that Petitioner's Petition For Writ of Certiorari be denied.



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## STATEMENT OF THE CASE

### A. Proceedings In The State Courts

It would appear that Petitioner has correctly set forth the proceedings had in the Courts below.

### B. Statement Of The Facts

It would likewise appear that Petitioner has correctly set forth the facts insofar as the reported facts serve its posture in this case; Respondent feels that certain critical matters which Petitioner has failed to set forth are found in the reporter's transcript of testimony heard in San Francisco Municipal Court on February 22, 1972, during the hearing on Respondent's motion to suppress evidence of the blood sample, commencing at page 17 of the reporter's transcript, line 5, upon cross-examination of Officer James Leonard, as follows:

> Q: At any time during the contact which you had with Mr. Hills on



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the evening -- or the morning in question, did you ever advise him of any rights that he had to remain silent?

A: No, I did not.

Q: How about the right that anything he said may be used against him in court?

A: I did not.

Q: Did you ever offer Mr. Hills any choice of a test of his urine or breath, in addition to any serology?

A: I did not.

Q: Now, you say you filed a Complaint. How do you go about filing a Complaint?

A: I just turned it in to the office. It reaches the D.A. and the D.A. makes a recommendation and comes back, and you write a ticket. A Complaint goes via this report. The report is turned in to the office.



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Q: Did you place any restraint upon Mr. Hills in the hospital? Did you leave any instructions that he was not to leave?

A: No, I did not.

Q: So, in other words, he was free to go?

A: Yes, he was released to the hospital.

Q: Did you have Mr. Hills sign any citation or notice to appear?

A: He was incapable to, but we did not have him do that anyway.

Q: I move to strike his 'incapable' as being conclusion.

THE COURT: Did you?

THE WITNESS: He did not sign anything, no.

MR. BACON: Q: Did you prepare one and attempt to have him sign it at any point in time?

A: I did not.



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On direct examination, after being called as witness, Respondent testified as follows at page 21 of the reporter's transcript, commencing at line 17:

Q: What happened after this conversation with the blood test? Did you go to sleep?

A: Yes. They put me in a ward and I went to sleep.

Q: Did they tell you that they couldn't leave?

A: No.

Q: Were you notified in any respect at that point in time that you were to appear in Court?

A: No.

Q: Did anybody attempt to prevent you from leaving the hospital?

A: No.

Q: Did you have to make any kind of security deposit to assure your appearance in court or any place?

A: No.

## IT IS RESPECTFULLY SUBMITTED THAT THE UNITED STATES SUPREME COURT DOES NOT HAVE JURISDICTION TO ENTERTAIN OR GRANT PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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Petitioner has invoked the jurisdiction of the United States Supreme Court to grant certiorari in this case under the provisions of Title 28, United States Code, Section 1257 (3), which provides:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "(1) * * *
>
> "(2) * * *
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant



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to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercise under, the United States."

It appears to be a well-settled principle of case law that the United States Supreme Court cannot grant certiorari involving a state Court decision, when such state Court decision is based upon adequate, independent state grounds.

Dixon v. Duffy (1951)
342 U.S. 33;

Edelman v. People of the State of California (1953)
344 U.S. 357.

Further, it appears equally well-settled that certiorari will not be granted unless it obvious that a Federal question was the sole basis of an erroneous decision



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by the state Court from which review is sought.

Department of Mental Hygiene of California v. Kirchner (1965) 380 U.S. 194.

THE DECISION OF THE COURT BELOW IS CORRECT, IS BASED SOLELY UPON INDEPENDENT STATE GROUNDS, AND DOES NOT INVOLVE A FEDERAL QUESTION, THEREBY PRECLUDING A GRANT OF CERTIORARI

In 1972, the California Supreme Court decided the case of People v. Superior Court, Hawkins Real Party in Interest (1972) 6 Cal.3d 757, positively holding that, in order for law enforcement officers to either make, or cause to be made, a warrantless intrusion by way of search into a person's body for the purposes of extracting blood for a blood alcohol sample, there must be an antecedent, pre-existent and lawful arrest.

Even the most cursory reading of the decision of the Appellate Department of the Superior Court of California for the City and County of San Francisco, the Court



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below, attached as Appendix "A" to Petitioner's Petition herein, will show that the Court below followed the ruling of People v. Superior Court, supra, as well as established decisions of the United States Supreme Court, in reversing the decision of the San Francisco Municipal Court and holding that the blood sample of Respondent be suppressed.

In its decision, now final, of People v. Superior Court, supra, the California Supreme Court also appears to have placed at rest any uncertainty of pre-existing California appellate decisions as is suggested by Petitioner on pages 19 and 20 of its Petition herein.

## REASONS WHY THE WRIT SHOULD NOT BE GRANTED

No Federal question was involved in the decision of the Court below, and, further, the decision of the California Supreme Court in People v. Superior Court, Hawkins Real Party in Interest (1972) 6 Cal.3d 757, does not "misperceive" the thrust of the



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United States Supreme Court's decisions pertaining to the taking of blood samples from motorists suspected of intoxication. Respondent respectfully submits that the law is, has been, and, should remain to be, that a lawful arrest is an indispensable prerequisite for a warrantless search into a person's body. No uniformity of decisions is required, as the decision of the Court below not only follows the law of California, but is also soundly in accord with the laws of the United States, as have been previously decreed by this reviewing Court. Certiorari should not be granted.



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## ARGUMENT

### IT IS THE SETTLED LAW OF BOTH CALIFORNIA AND THE UNITED STATES THAT A PEACE OFFICER, HAVING PROBABLE CAUSE TO ARREST A MOTORIST FOR DRIVING WHILE INTOXICATED, MUST NONETHELESS PERFECT A VALID AND LAWFUL ARREST OF THE MOTORIST INVOLVED, BEFORE SUCH PEACE OFFICER'S AUTHORITY COMES INTO FRUITION TO CONDUCT A WARRANTLESS SEARCH BY WAY OF EXTRACTION OF THE MOTORIST'S BLOOD FOR ALCOHOL ANALYSIS, "EMERGENCY" CONDITIONS ATTENDING TO THE SITUATION NOTWITHSTANDING

The Legislature of the State of California had enacted various statutory guidelines for the making of arrests, as were in force and effect on November 18, 1971, the date upon which Respondent and Officers of the California Highway Patrol intersected in their encounter which has formed the basis for these proceedings.

Section 834, California Penal Code, provides:

> "An arrest is taking a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace-officer or by a private person."

The Courts of California have held that a "detention" is not an arrest, People v. Manis (1969) 268 Cal.App.2d 653, and that actual restraint of the person and taking him into custody are essential elements of any "arrest." People v. Hatcher (1969) 2 Cal.App.3d 71.

Section 836.5, California Penal Code, in pertinent part, provides:

> "(a) A public officer or employee, when authorized by ordinance, may arrest a person without a warrant whenever he has reasonable cause to believe that the person to be arrested has committed a misdemeanor in his presence which is a violation of statute or ordinance which such officer or employee has the duty to enforce.
>
> "(c) In any case in which a person is arrested pursuant to subdivision (a) and the person arrested does not demand to be taken before a magistrate, the public officer or employee making the arrest shall prepare a written notice to appear



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and release the person on his promise to appear * * *."

Section 841, California Penal Code, in pertinent part, provides:

"The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person making the arrest has reasonable cause to believe that the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, or the person to be arrested is pursued immediately after its commission, or after an escape."

Section 849, California Penal Code, in pertinent part, provides:

"(a) When an arrest is made without a warrant by a peace officer or private person, the person arrested, shall, without unnecessary delay, be taken before the nearest or most accessible



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magistrate in the county in which the offense is triable, and a complaint stating the charge against the arrested person shall be laid before such magistrate.

"(b) Any peace officer may release from custody, instead of taking such person before a magistrate, any person arrested without a warrant whenever:

(1) He is satisfied that there are insufficient grounds for making a criminal complaint against the person arrested.

(2) The person arrested was arrested for introxication only, and no further proceedings are desirable.

"(c) * * *."

Perhaps most important, when viewed in the facts of this present Petition, are the provisions of Section 40500, California Vehicle Code, which provides:



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"Whenever a person is arrested for any violation of this code not declared to be a felony, or for a violation of an ordinance of a city or county relating to traffic offenses and he is not immediately taken before a magistrate, as provided in this chapter, the arresting officer shall prepare in triplicate a written notice to appear in court or before a person authorized to receive a deposit of bail, containing the name and address of the person, the license number of his vehicle, if any, the name and address, when available, of the registered owner or lessee of the vehicle, the offense charged and the time and place when and where he shall appear."

In deciding People v. Superior Court (1972) 6 Cal.3d 757, supra, the California Supreme Court neither "clouded the slate" upon which the decision of Schmerber v. California (1966) 384 U.S. 757, was written by the United States Supreme Court, nor did it create any "uncertainty" whereby it



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becomes necessary for the United States Supreme Court to "redefine the parameters of Schmerber," as requested by Petitioner.

The concept and dictate of a lawful arrest being an imperative condition precedent to any type of search is most vital and basic to the mandates of Constitutional law.

Respondent's basic arguments can perhaps be best set forth by quoting from People v. Superior Court, supra, where, speaking for the majority, Mr. Justice Sullivan, at page 762, declares:

> "The People favor us with no authority supportive of their startling proposition that in this context a lawful arrest is but a mere formality. Indeed this proposition runs directly counter to the law on search and seizure developed by the United States Supreme Court. '[T]his Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities

to the least intrusive means consistent with that end. Searches conducted without warrants have been held unlawful "notwithstanding facts unquestionably showing probable cause," Agnello v. United States, 269 U.S. 20, 33, for the Constitution requires "that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . . ." Wong Sun v. United States, 371 U.S. 471, 481-482. "Over and over again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," United States v. Jeffers, 342 U.S. 48, 51, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions.' (Fns. omitted.) (Katz v. United States (1967) 389 U.S. 347, 356-357."

And, further, at page 763:

"In Schmerber, the Supreme Court unequivocally stated that even a lawful arrest would not in itself justify a seizure of blood without a warrant, unless there was in addition a 'clear indication' that a blood-alcohol test will reveal intoxication. The court indicated that a more stringent test was applicable because of the great interest in protecting the human body from intrusion. In the light of the clear and consistent holdings of the high court in this area, it would indeed be incongruous to say that absent exigent circumstances an intrusion without a warrant into a person's home is per se unreasonable even though the authorities have probable cause to believe it contains contraband or evidence of crime, and to reason at the same time from the same legal premises that such an intrusion into his physical body is constitutionally permissible merely if they have probable cause

to believe it contains evidence of his intoxication.

"The Supreme Court has made it abundantly clear that the burden is on the People to show an overwhelming need that would justify a search without a warrant. 'The exceptions [to the requirement of a warrant] are "jealously and carefully drawn," [Jones v. United States, 357 U.S. 493, 499] and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative." [McDonald v. United States, 335 U.S. 451, 456.] "[T]he burden is on those seeking the exemption to show the need for it." [United States v. Jeffers, 342 U.S. 45, 51.]' (Coolidge v. New Hampshire (1971) 403 U.S. 443, 455.)

"As we previously stated, the People attempt to meet this burden, by claiming that arrest is merely a formality, a ritualistic incantation of words, as it were, that in no way goes to the substance of the situation.

> At the same time the People argue that out of a humane consideration for the condition of the injured motorist, it is normal and proper police procedure not to arrest him until after the results of the blood-alcohol test are received. We are at a loss to determine how a meaningless ritual of words is at the same time so great a burden that it is inhumane to inflict this ritual upon an injured person. At any rate, the burden was never inflicted in the case at bench, since defendant was never arrested."

The essential distillate of Petitioner's Petition is this: Officer James Leonard failed, for reasons best known to himself, to follow the legislative and case law mandates and never arrested Respondent. Regardless of this lack of arrest, Officer Leonard nevertheless caused an intrusion to be made into the person of Respondent for the extraction of a blood alcohol sample. The facts of the case are clear:

(1) Respondent was stopped by the Officers, who suspected him of driving under the influence of intoxicants;

(2) Before an arrest was made, Respondent became unconscious, and was taken by the Officers for medical treatment -- during the course of this hospitalization, and, again, with no arrest having been made, the Officers ordered a blood sample to be taken from Respondent for blood alcohol analysis;

(3) During the entire procedure, from traffic stop to hospitalization, Respondent was never advised that he was under "arrest," nor was he in fact arrested, nor was any citation ever prepared for him by the Officers involved;

(4) After the taking of the test was completed, Respondent was "free to go," and released to the hospital.

Now, in view of the Officers' failure to comply with what are respectfully urged to be patently clear statutory procedures required for "arrest" in California, as have been set forth herein, Petitioner, the State of California, would have it that the United States Supreme Court should grant certiorari to provide "guidelines" for future situations of the type presented here. Respondent further respectfully urges that to petition the Supreme Court of the United States for such assistance is an unnecessary request.

The law of California, together with the decisions of the United States Supreme Court cited herein, require that a lawful arrest be a valid condition precedent to an intrusionary search. It would appear that the State of California's alleged dilemma presented by its Petition can be resolved by a simple directive, issued at an administrative level, to all peace officers who might possibly become involved with unconscious motorists suspected of intoxication, such directive couched in terms such as:

(A) If the motorist stopped for suspicion of driving while intoxicated either becomes unconscious, or is found unconscious at the scene of an accident, take such person into your custody and submit him to whatever medical treatment is deemed reasonably necessary under the circumstances.

(B) If the objective symptoms of intoxication so warrant, place the person under arrest for violation of the applicable statute or ordinance involved; make all reasonable efforts to audibly notify your suspect that he is, in fact, under arrest and advise of rights, if possible.

(C) In the event that your particular local situation requires placing your arrestee in the custody of civilians for medical treatment or hospitalization, prepare the citation required by Section 40500, California Vehicle Code, and, if possible, have the arrestee sign

the same. If the arrestee cannot or is not capable of signing, have such citation placed in his admission record at such civilian medical facility, and inform those in charge that he is (1) at least, to be handed or served with a copy of same upon discharge, or (2) preferably to sign same and retain a copy, with discharging personnel returning a signed copy (or proof of service) to the arresting agency.

(D) Once the citation or notice to appear specified in Section (C) is completed, you are then free to proceed with chemical tests for blood alcohol in a manner prescribed by law.

In the event that Officer Leonard had followed a procedure similar to the hypothetical one suggested above, it is submitted that Respondent would have been validly "arrested" and that these proceedings would never have come to be. However, such is not the case; for, Respondent was not arrested.

The machinery of prosecution can only be set in motion against a person, such as Respondent, by some form of notice; in situations involving persons driving while allegedly intoxicated, this "notice" must take the form of a lawful arrest - an arrest made in accordance with the statutory and decisional guidelines set forth above in this Response.

Respondent believes that this essential requirement of arrest-notice is the baseline upon which the Constitutional decisions involved in this matter are found. They are lacking in this instant case by reason of the facts, and not of the law. Therefore, certiorari, as has been discussed above, is neither an appropriate nor a required solution.

## CONCLUSION

It is respectfully requested that the Court deny Petitioner's Petition for a Writ of Certiorari and thereby affirm the decision of the San Francisco Superior Court -- Appellate Division.

Respectfully submitted,

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A Member of the Bar of this Court

-and-

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